



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

February 23, 2021 Government Records Council Meeting

Rotimi Owoh, Esq. (o/b/o African American
Data & Research Institute & Baffi Simmons)
Complainant
v.
City of Camden (Camden)
Custodian of Record

Complaint No. 2018-291 and 2018-306

At the February 23, 2021 public meeting, the Government Records Council ("Council") considered the February 16, 2021 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that the Custodian has failed to establish in her request for reconsideration of the Council's September 29, 2020 Interim Order that either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Custodian failed to establish that the complaint should be reconsidered based on mistake, extraordinary circumstances, or change in circumstance. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Custodian's request for reconsideration was largely a restatement of arguments previously submitted rather than a mistake by the Council. Additionally, the Custodian failed to demonstrate that the City's circumstances warranted a reversal of long-standing precedent. Thus, the Custodian's request for reconsideration should be denied Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). The Council's November 10, 2020 Interim Order remains in effect and the Custodian must comply accordingly.

Interim Order Rendered by the
Government Records Council
On The 23rd Day of February 2021

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: February 24, 2021



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***Reconsideration*
Supplemental Findings and Recommendations of the Executive Director
February 23, 2021 Council Meeting**

**Rotimi Owoh, Esq. (On Behalf of African American
Data & Research Institute & Baffi Simmons)¹
Complainant**

**GRC Complaint Nos. 2018-291
and 2018-306**

v.

**City of Camden (Camden)²
Custodial Agency**

Records Relevant to Complaint:

November 14, 2018 OPRA request: Electronic copies via e-mail of:

1. Copies of Driving While Intoxicated/Driving under the Influence (“DWI/DUI”) complaints and summonses prepared and filed by the Police Department from January 2017 through present.
2. Drug possession complaints and summonses prepared and filed by the Police Department from January 2017 through present.
3. Copies of the Police Department’s “Arrest Listings” from January 2017 to present.
4. Copies of drug paraphernalia complaints and summonses prepared by the Police Department from January 2017 through present.

November 23, 2018 OPRA request: Electronic copies via e-mail of:

1. “Record Retention and Disposition Schedules” used by the Police Department from January through December 2016; January through December 2017; and January through present 2018.
2. Records Retention and Disposition policies and directives used by the Police Department for the time frames in item No. 1.
3. Standard Operating Procedures (“SOP”) for retention and disposition used by the Police Department for the time frames in item No. 1.
4. Agreement between the City of Camden (“City”) and the applicable storage facility or any record showing the address where the City stored summonses and complaints for fifteen (15) years.
5. SOP, manual, and directives relating to use of the eCDR system by the Police Department.
6. Name, title, position, and date of hire for each individual within the Police Department with access to the eCDR system.

¹ The Complainant represents the African American Data & Research Institute.

² Represented by Timothy J. Galanaugh, Esq. (Camden, NJ).

7. "Arrest Card File" from January 2017 through November 2018.
8. "Summonses Log Book" from January 2017 through November 2018.

Custodian of Record: Luis Pastoriza

Request Received by Custodian: November 15, 2018; N/A

Response Made by Custodian: November 15, 2018; N/A

GRC Complaint Received: November 26, 2018; December 10, 2018

Background

November 10, 2020 Council Meeting:

At its public meeting, the Council considered the October 27, 2020 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian unlawfully denied access to the Complainant's November 14, 2018 OPRA request on the basis that the County, with which the City had a shared services agreement, possessed the responsive records. N.J.S.A. 47:1A-6; Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010); Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012). The Custodian had an obligation to obtain the responsive records from the County and provide same to the Complainant. See Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (December 2005). Thus, the Custodian shall obtain the responsive records from the County and provide same to the Complainant.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver³ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁴ to the Executive Director.⁵**
3. The evidence of record supports that the Custodian never received the Complainant's November 23, 2018 OPRA request, and the Complainant's evidence is insufficient to overcome the Custodian's and Ms. Guzman's certifications. Thus, the Custodian did not unlawfully deny access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. See

³ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁴ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁵ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Rotimi Owoh, Eq. (On Behalf of African American Data & Research Institute & Baffi Simmons) v. City of Camden (Camden), 2018-291 and 2018-306 – Supplemental Findings and Recommendations of the Executive Director 2

Martinez v. Morris Cnty. Prosecutor's Office, GRC Complaint No. 2014-2 (September 2014), and Valdes v. N.J. Dep't of Educ., GRC Complaint No. 2012-19 (April 2013).

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On November 12, 2020, the Council distributed its Interim Order to all parties. On November 23, 2020, the Custodian's Counsel requested reconsideration of the Council's November 10, 2020 Interim Order but did not provide a completed request for reconsideration form pursuant to N.J.A.C. 5:105-2.10.

On February 4, 2020, the GRC informed the Custodian that a completed form had not been received. On February 5, 2020, Counsel requested the location to obtain the required form. That same day, the GRC informed Counsel that the letter accompanying the Council's Interim Order included directions as to where to locate the required form, and the deadline to submit same to the GRC.

On February 11, 2020, Counsel filed a request for reconsideration of the Council's Interim Order based on mistake, extraordinary circumstances, and change in circumstance.

Counsel asserted that the decision required the City of Camden ("City") to produce documents which it did not have possession or control over. Counsel asserted that the City's police department had been disbanded and taken over by Camden County ("County"), which has control over the requested records. Thus, Counsel argued that the City could not produce the records.

Analysis

Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, the Custodian's Counsel requested reconsideration of the Council's Order dated November 10, 2020 on November 23, 2020, seven (7) business days from the issuance of the Council's Order. However, Council did not file the request for reconsideration

form until February 11, 2021, approximately sixty (60) business days from the issuance of the Council's Order.

Applicable case law holds that:

"A party should not seek reconsideration merely based upon dissatisfaction with a decision." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, . . . 242 N.J. Super. at 401. "Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement." Ibid.

[In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).]

The GRC initially notes that the Custodian did not timely submit a request for reconsideration form pursuant to N.J.A.C. 5:105-2.10. However, even if timely submitted, the Custodian's request for reconsideration should be denied. The Council's decision requiring the Custodian to obtain the responsive records from Camden County is controlled by Burnett and Michalak. The responsive records were maintained by Camden County with whom the City had a shared services agreement, and the Custodian was obligated to obtain the records and provide them to the Complainant. The Custodian's arguments on reconsideration fail because it restates the arguments made unsuccessfully in the January 8, 2019 Statement of Information. Therefore, there is no basis to reverse the Council's decision.

As the moving party, the Custodian was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See Cummings*, 295 N.J. Super. at 384. The Custodian failed to establish that the complaint should be reconsidered based on mistake, extraordinary circumstances, or change in circumstance. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. *See D'Atria*, 242 N.J. Super. at 401. Specifically, the Custodian's request for reconsideration was largely a restatement of arguments previously submitted rather than a mistake by the Council. Additionally, the Custodian failed to demonstrate that the City's circumstances warranted a reversal of long-standing precedent. Thus, the Custodian's request for reconsideration should be denied. *Cummings*, 295 N.J. Super. at 384; *D'Atria*, 242 N.J. Super. at 401; *Comcast*, 2003 N.J. PUC at 5-6. The Council's November 10, 2020 remains in effect and the Custodian must comply accordingly.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian has failed to establish in her request for reconsideration of the Council's September 29, 2020 Interim Order that either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Custodian failed to establish that the complaint should be reconsidered based on mistake, extraordinary circumstances, or change in circumstance. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Custodian's request for reconsideration was largely a restatement of arguments previously submitted rather than a mistake by the Council. Additionally, the Custodian failed to demonstrate that the City's circumstances warranted a reversal of long-standing precedent. Thus, the Custodian's request for reconsideration should be denied Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). The Council's November 10, 2020 Interim Order remains in effect and the Custodian must comply accordingly.

Prepared By: Samuel A. Rosado
Staff Attorney

February 16, 2021



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

November 10, 2020 Government Records Council Meeting

Rotimi Owoh, Esq. (o/b/o African American Complaint No. 2018-291 and
Data and Research Institute and Baffi Simmons) 2018-306
Complainant
v.
City of Camden (Camden)
Custodian of Record

At the November 10, 2020 public meeting, the Government Records Council ("Council") considered the October 27, 2020 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian unlawfully denied access to the Complainant's November 14, 2018 OPRA request on the basis that the County, with which the City had a shared services agreement, possessed the responsive records. N.J.S.A. 47:1A-6; Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010); Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012). The Custodian had an obligation to obtain the responsive records from the County and provide same to the Complainant. See Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (December 2005). Thus, the Custodian shall obtain the responsive records from the County and provide same to the Complainant.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³**

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

² "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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3. The evidence of record supports that the Custodian never received the Complainant's November 23, 2018 OPRA request, and the Complainant's evidence is insufficient to overcome the Custodian's and Ms. Guzman's certifications. Thus, the Custodian did not unlawfully deny access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. See Martinez v. Morris Cnty. Prosecutor's Office, GRC Complaint No. 2014-2 (September 2014), and Valdes v. N.J. Dep't of Educ., GRC Complaint No. 2012-19 (April 2013).
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 10th Day of November 2020

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: November 12, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 10, 2020 Council Meeting**

**Rotimi Owoh, Esq. (On Behalf of African American
Data & Research Institute & Baffi Simmons)¹
Complainant**

**GRC Complaint Nos. 2018-291
and 2018-306**

v.

**City of Camden (Camden)²
Custodial Agency**

Records Relevant to Complaint:

November 14, 2018 OPRA request: Electronic copies via e-mail of:

1. Copies of Driving While Intoxicated/Driving under the Influence (“DWI/DUI”) complaints and summonses prepared and filed by the Police Department from January 2017 through present.
2. Drug possession complaints and summonses prepared and filed by the Police Department from January 2017 through present.
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November 23, 2018 OPRA request: Electronic copies via e-mail of:

1. “Record Retention and Disposition Schedules” used by the Police Department from January through December 2016; January through December 2017; and January through present 2018.
2. Records Retention and Disposition policies and directives used by the Police Department for the time frames in item No. 1.
3. Standard Operating Procedures (“SOP”) for retention and disposition used by the Police Department for the time frames in item No. 1.
4. Agreement between the City of Camden (“City”) and the applicable storage facility or any record showing the address where the City stored summonses and complaints for fifteen (15) years.
5. SOP, manual, and directives relating to use of the eCDR system by the Police Department.
6. Name, title, position, and date of hire for each individual within the Police Department with access to the eCDR system.
7. “Arrest Card File” from January 2017 through November 2018.

¹ The Complainant represents the African American Data & Research Institute.

² Represented by Timothy J. Galanaugh, Esq. (Camden, NJ).

Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institute & Baffi Simmons) v. City of Camden (Camden), 2018-291 and 2018-306 – Findings and Recommendations of the Executive Director

8. “Summonses Log Book” from January 2017 through November 2018.

Custodian of Record: Luis Pastoriza

Request Received by Custodian: November 15, 2018; N/A

Response Made by Custodian: November 15, 2018; N/A

GRC Complaint Received: November 26, 2018; December 10, 2018

Background³

Request and Response:

On November 14, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 15, 2018, the Custodian responded in writing advising that the City did not maintain the requested records. The Custodian directed the Complainant to contact Camden County (“County”).

On November 23, 2018, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records.

Denial of Access Complaint:

On November 26, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”) relevant to GRC 2018-291. The Complainant contended that the Custodian failed to disclose the records responsive to the subject OPRA request. The Complainant argued that GRC case law support that summonses and complaints are disclosable under OPRA. See Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004). The Complainant also noted that “other police departments have made similar records available.” The Complainant thus requested that the Council find that the Custodian violated OPRA. See Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010); Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012). The Complainant further requested that he should be awarded attorney’s fees.

On December 10, 2018, the Complainant filed a Denial of Access Complaint with the GRC relevant to GRC 2018-306. The Complainant asserted that the Custodian failed to respond to his OPRA request in the statutory time frame. The Complainant thus requested that the Council find that the Custodian violated OPRA. See Burnett, 415 N.J. Super. 506; Michalak, GRC 2010-220. The Complainant further requested that he should be awarded attorney’s fees.

Supplemental Response:

On December 10, 2018, Custodian’s Counsel responded in writing on behalf of the Custodian stating that the City did not receive the Complainant’s November 23, 2018 OPRA request. Counsel noted that he could provide a legal certification to the Complainant attesting to

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Rotimi Owoh, Eq. (On Behalf of African American Data & Research Institute & Baffi Simmons) v. City of Camden (Camden), 2018-291 and 2018-306 – Findings and Recommendations of the Executive Director

this fact is necessary. Counsel further stated that the City did not have a police department during the time frames identified in the OPRA request, as the County assumed police duties in May 2013. Counsel thus stated that the Complainant should submit his OPRA request to the County.

On December 14, 2018, Custodian's Counsel e-mailed the Complainant seeking acknowledgment that he received Counsel's December 10, 2018 e-mail. On the same day, the Complainant responded stating that Counsel should file his answer with the GRC since he properly sent his OPRA request and it was attached to the Denial of Access Complaint.

Statement of Information:

On January 8, 2019, the Custodian filed a consolidated Statement of Information ("SOI") for both GRC 2018-291 and 2018-306.

GRC 2018-291

The Custodian certified that he received the Complainant's OPRA request on November 15, 2018. The Custodian certified that he did not conduct a search because the City was not the custodian for Camden County Metro Police Department records ("CCMPD"). The Custodian certified that he responded in writing on same day advising that no records existed, and the Complainant should contact the County.

The Custodian averred that the City did not maintain any records responsive to the November 14, 2018 OPRA request. The Custodian certified that CCMPD assumed policing duties for the City in 2013 pursuant to a "formal shared services arrangement." The Custodian noted that he informed the Complainant of this fact at the time of his response.

GRC 2018-306

The Custodian certified that he did not receive the Complainant's November 23, 2018 OPRA request and thus did not respond to it. The Custodian nonetheless stated that had he received the OPRA request, his response would have mirrored his response to the November 14, 2018 OPRA request. The Custodian argued that it was "important to keep in mind" that the City was not the custodian of record for CCMPD records.

Additional Submissions:

On January 16, 2019, the Complainant submitted a letter response to the SOI.

GRC 2018-291

The Complainant contended that the Custodian had an obligation to obtain records from CCMPD because the City was engaged in a shared services agreement with it. Burnett, 415 N.J. Super. 506; Michalak, GRC 2010-220. The Complainant argued that the Custodian's failure to do so resulted in an unlawful denial of access. The Complainant renewed his request to order disclosure of the responsive records and that he be awarded prevailing party attorney's fees.

GRC 2018-306

The Complainant contended that he did not receive an error message or undeliverable notice after sending his November 23, 2018 OPRA request to the Custodian via e-mail. The Complainant further noted that he used the same e-mail address to send both OPRA requests at issue here. The Complainant argued that there was no dispute that the Custodian received the November 14, 2018 OPRA request and no question that he sent the November 23, 2018 to the same account. The Complainant further argued that even after receiving the Denial of Access Complaint through the same e-mail address, the Custodian has failed to “take steps to comply with the OPRA request.” The Complainant thus reiterated the relief sought above.

On September 14, 2020, the GRC requested additional information from the Custodian. Specifically, the GRC requested detailed information on what search, if any, was conducted to locate the Complainant’s November 23, 2018 e-mail containing his OPRA request.

On September 30, 2020, the Custodian’s Counsel responded on behalf of the Custodian, providing certifications from the Custodian and Elena Guzman, Data Entry Operator for the City.

The Custodian certified that when notified of the Complainant’s claim he submitted an OPRA request on November 23, 2018, he reviewed his e-mail records and found no evidence of receiving the request. Ms. Guzman certified that she was responsible for receiving and obtaining responses to OPRA requests submitted to the City. Ms. Guzman certified that she searched for the e-mail via the “Eclipse/DOCSTAR” retrieval system maintained by the City. Ms. Guzman certified that the search did not produce an OPRA request dated November 23, 2018 but did locate an OPRA request received on November 15, 2018.

Analysis

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

GRC 2018-291

In Burnett, 415 N.J. Super. 506, the Appellate Division determined that the defendant was required to obtain settlement agreements from its insurance broker. The court’s decision largely rested on the fact that there was no question that the broker was working on behalf of the defendant to execute settlement agreements. The court noted that it previously held that although a third party, such as insurance broker or outside counsel, may execute settlement agreements, “they nonetheless bind the county as principal, and the agreements are made on its behalf.” Id. at 513. In determining that the defendant had an obligation to obtain responsive records from the insurance

broker, the court distinguished Bent, 381 N.J. Super. at 38-39, from the facts before it. The court reasoned that:

In Bent, the requester sought records and information regarding a criminal investigation of his credit card activities conducted jointly by the Stafford Township Police Department [“(STPD)”], the United States Attorney for New Jersey and a special agent of the Internal Revenue Service. As part of his request, Bent sought “discrete records of the 1992 criminal investigation conducted by the STPD,” which were fully disclosed. Id. at 38. Additionally, he sought a “[c]opy of contact memos, chain of custody for items removed or turned over to third parties of signed Grand Jury reports and recommendations.” Bent v. Stafford Twp. Police Dept., GRC 2004-78, final decision (October 14, 2004). Affirming the determination of the [GRC], we stated: “to the extent Bent's request was for records that either did not exist or were not in the custodian's possession, there was, of necessity, no denial of access at all.” Bent, *supra*, 381 N.J. Super. at 38 . . . We continued by stating:

“Of course, even if the requested documents did exist, the custodian was under no obligation to search for them beyond the township's files. OPRA applies solely to documents ‘made, maintained or kept on file in the course of [a public agency's] official business,’ as well as any document ‘received in the course of [the agency's] official business.’ N.J.S.A. 47:1A-1.1. Contrary to Bent's assertion, although OPRA mandates that ‘all government records . . . be subject to public access unless exempt,’ the statute itself neither specifies nor directs the type of record that is to be ‘made, maintained or kept on file.’ In fact, in interpreting OPRA's predecessor statute, the Right to Know Law, we found no requirement in the law concerning ‘the making, maintaining or keeping on file the results of an investigation by a law enforcement official or agency into the alleged commission of a criminal offense. . . Thus, even if the requested documents did exist in the files of outside agencies, Bent has made no showing that they were, by law, required to be ‘made, maintained or kept on file’ by the custodian so as to justify any relief or remedy under OPRA. N.J.S.A. 47:1A-1.1.”

[T]he circumstances presented in Bent [are] far removed from those existing in the present matter because, as we have previously concluded, the settlement agreements at issue here were “made” by or on behalf of the Board in the course of its official business. Were we to conclude otherwise, a governmental agency seeking to protect its records from scrutiny could simply delegate their creation to third parties or relinquish possession to such parties, thereby thwarting the policy of transparency that underlies OPRA. N.J.S.A. 47:1A-1.

[Id. at 516-17.]

The Council subsequently expanded the court's holding in Burnett to agencies entered into a shared services agreement. See Michalak, GRC 2010-220. In that case, the complainant sought police dispatch logs from the Borough of Helmetta ("Helmetta"). The custodian asserted that Helmetta did not maintain the records as dispatch calls were routed through the Spotswood Police Department ("SPD"). The Council held that since Helmetta entered into a shared services agreement with the Borough of Spotswood to operate Helmetta's dispatch log, the custodian was obligated to obtain the requested records from SPD. The Council found that SPD "made, maintained, or kept on file" the dispatch logs on behalf of Helmetta pursuant to the shared services agreement. See Burnett, 415 N.J. Super. at 517.

Moreover, in Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (December 2005), the complainant requested e-mails sent to various individuals regarding official business but located on the mayor's home computer. The custodian alleged that due to the records' location, they were not government records. The Council found that the definition of a government record was not restricted its physical location. The Council further found that the requested records should be released in accordance with OPRA, to the extent they fell within the definition of a government record. Thus, the Council held that the location of a document was immaterial to its status as a government record.

Both Burnett and Michalak are directly applicable in the instant matter. The evidence of record demonstrates that the City entered into a shared services agreement with the County in 2013 to provide law enforcement services within the City. Thus, the requested records were created and maintained in the County on behalf of the City. Additionally, the Custodian was obligated to retrieve the records from the County, as their physical location was immaterial. See Meyers, GRC 2005-127.

Accordingly, the Custodian unlawfully denied access to the Complainant's November 14, 2018 OPRA request on the basis that the County, with which the City had a shared services agreement, possessed the responsive records. N.J.S.A. 47:1A-6; Burnett, 415 N.J. Super. 506; and Michalak, GRC 2010-220. The Custodian had an obligation to obtain the responsive records from the County and provide same to the Complainant. See Meyers, GRC 2005-127. Thus, the Custodian shall obtain the responsive records from the County and provide same to the Complainant.

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OPRA further provides that, "a request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian." N.J.S.A. 47:1A-5(g). OPRA further provides that, "the council shall make a determination as to whether the complaint is within its jurisdiction or frivolous or *without any reasonable factual basis*." N.J.S.A. 47:1A-7(e) (emphasis added).

In Martinez v. Morris Cnty. Prosecutor's Office, GRC Complaint No. 2014-2 (September 2014), the complainant contended that the custodian should have received his OPRA request and provided a photocopy of the certified mail receipt as evidence. The certified mail receipt identified

the date of delivery and confirmed that the address was correct. The Council held that the certified mail receipt was insufficient to show that the custodian received the request.

Furthermore, in Valdes v. N.J. Dep't of Educ., GRC Complaint No. 2012-19 (April 2013), the complainant filed a complaint after not receiving a response to his OPRA request. As part of his Denial of Access Complaint, the complainant included a certified mail receipt stamped "State of NJ – Capital Post Office." The Council determined that the custodian did not unlawfully deny access to the complainant's OPRA request because same was never received. The Council reasoned that "the Custodian did not sign the receipt and there is no indication that [the Department of Education] received the request, only that the State received it . . . it is entirely possible that the Custodian never received the OPRA request." Id. See also Bey v. State of New Jersey, Office of Homeland Security & Preparedness, GRC Complainant No. 2013-237 (February 2014) (complainant's certified mail return receipt sufficient only to show that the State received the request, not the custodian).

In the instant matter, the Complainant contended that he submitted his OPRA request to the Custodian on November 23, 2018 and provided a copy of his e-mail indicating same. The Complainant also argued that if the message was not delivered properly, his e-mail provider would have sent an error message indicating same. The Complainant also noted that the Custodian successfully received and responded to the November 14, 2018 OPRA request using the same e-mail address. The Custodian certified in the SOI that he did not receive the Complainant's e-mail containing his OPRA request. In response to the GRC's request for additional information, the Custodian re-certified that he reviewed his e-mail records and found no evidence of receiving the request. Ms. Guzman certified that she searched for the e-mail using the City's document retrieval system but was only able to locate the November 14, 2018 OPRA request.

The facts in this matter are analogous to those in Martinez, GRC 2014-2 and Valdes, GRC 2012-19. Like the certified mail receipts, the Complainant's e-mail copy is evidence that the e-mail was sent to the correct e-mail address but does not confirm that the Custodian received the e-mail on his server. Furthermore, the contention that the Complainant did not receive an error message is not positive evidence that the Custodian received the e-mail. Thus, the Complainant's evidence is insufficient to overcome the Custodian's and Ms. Guzman's certification that the City never received the e-mail containing the Complainant's November 23, 2018 OPRA request after searching through his e-mail account.

Therefore, the evidence of record supports that the Custodian never received the Complainant's November 23, 2018 OPRA request, and the Complainant's evidence is insufficient to overcome the Custodian's and Ms. Guzman's certifications. Thus, the Custodian did not unlawfully deny access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. See Martinez, GRC 2014-2, and Valdes, GRC 2012-19.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prevailing Party Attorney's Fees

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian unlawfully denied access to the Complainant's November 14, 2018 OPRA request on the basis that the County, with which the City had a shared services agreement, possessed the responsive records. N.J.S.A. 47:1A-6; Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010); Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012). The Custodian had an obligation to obtain the responsive records from the County and provide same to the Complainant. See Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (December 2005). Thus, the Custodian shall obtain the responsive records from the County and provide same to the Complainant.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver⁴ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁵ to the Executive Director.⁶**
3. The evidence of record supports that the Custodian never received the Complainant's November 23, 2018 OPRA request, and the Complainant's evidence is insufficient to overcome the Custodian's and Ms. Guzman's certifications. Thus, the Custodian did not unlawfully deny access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. See Martinez v. Morris Cnty. Prosecutor's Office, GRC Complaint No. 2014-2 (September 2014), and Valdes v. N.J. Dep't of Educ., GRC Complaint No. 2012-19 (April 2013).
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

⁴ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁶ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Rotimi Owoh, Eq. (On Behalf of African American Data & Research Institute & Baffi Simmons) v. City of Camden (Camden), 2018-291 and 2018-306 – Findings and Recommendations of the Executive Director

5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado
Staff Attorney

October 27, 2020